

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

VENETIAN CASINO RESORT, LLC,

Plaintiff(s),

v.

ENWAVE LAS VEGAS, LLC,

Defendant(s).

Case No. 2:19-CV-1197 JCM (DJA)

ORDER

Presently before the court is defendant-counterclaimant Enwave Las Vegas, LLC's ("Enwave") motion for partial summary judgment ("MPSJ") on its breach of contract counterclaim. (ECF No. 39). Plaintiff-counterdefendant Venetian Casino Resort, LLC ("VCR") and counterdefendant Interface Group-Nevada, Inc. ("Interface") responded in opposition (ECF No. 44) to which Enwave replied (ECF No. 46).

Also before the court is VCR and Interface's objection to Magistrate Judge Daniel J. Albregts's order staying discovery pending resolution of Enwave's MPSJ. (ECF No. 62). Enwave responded in opposition. (ECF No. 63).

I. Background

This is a contract dispute over the rights to purchase and own a thermal energy production facility. The "crux of this case" is interpreting the Third Amendment to the three original energy services agreements ("ESAs"). (ECF No. 39 at 10). Enwave contends that the Third Amendment leaves intact the rights of VCR, Interface, and GCS to purchase their Divided Share of the Central Plant and Other Facilities. (*Id.*). That is, Interface and VCR are contractually obligated to pay their Divided Shares—\$3,187,616 and \$6,558,128 respectively—upon the expiration of the Renewal Term in exchange for Enwave conveying

1 to them their Divided Shares of the Central Plant. (*Id.* at 9–10). Interface and VCR are
2 affiliated and Enwave and GCS are affiliated.

3 VCR contends it has the “exclusive right to sole ownership of the Central Plant.”
4 (ECF No. 44 at 2). Enwave has a contractual obligation to convey the Central Plant to VCR
5 and VCR only in exchange for the full \$13,064,000 Purchase Option Payment. (*Id.*). The
6 Third Amendment is silent on how joint ownership would work and the court should not
7 “create its own joint ownership provision.” (*Id.* at 4). The Divided Shares merely “allocate
8 cost burdens,” they do not allocate or divide ownership. (*Id.* at 12). VCR asserts an
9 anticipatory breach of contract claim against Enwave. (ECF No. 1 ¶¶ 19–27). Enwave
10 asserts its own contractual counterclaims against VCR and Interface. (ECF No. 13).

11 On November 26, 2019, VCR and Interface moved to dismiss Enwave’s
12 counterclaims. (ECF No. 24). In the alternative, they asked for summary judgment on their
13 anticipatory breach of contract claim because “Enwave refused to accept full contractual
14 payment and because all of Enwave’s purported damages are self-inflicted harms designed to
15 obtain a non-existent purchase option for its sister company [GCS].” (*Id.* at 2).

16 On June 5, 2020, this court dismissed only Enwave’s declaratory judgment
17 counterclaim, allowing its breach of contract, unjust enrichment, and bad faith counterclaims
18 to proceed. (ECF No. 38). This court also found that it was “premature” to convert VCR
19 and Interface’s motion to dismiss into one for summary judgment:

20 Enwave advances a plausible reading of the contract such that there could be a
21 dispute as to its meaning. (ECF No. 13). But it does not appear discovery has
22 commenced in this case. The parties have not filed a proposed discovery plan
23 or scheduling order. It is premature for the court to impose a summary
judgment standard when the parties have not even begun exchanging
information through discovery. Accordingly, the court declines to convert
plaintiffs’ motion to dismiss into a motion for summary judgment.

24 (*Id.* at 7–8). Less than two weeks later, Enwave moved for partial summary judgment on its
25 own breach of contract counterclaim. (ECF No. 39). VCR and Interface filed an answer to
26 Enwave’s counterclaims three days later. (ECF No. 41).

27 On September 3, 2020, Enwave moved to stay discovery pending the resolution of its
28 MPSJ. (ECF No. 47). Enwave noted that “an entire year passed from the date the Venetian

1 commenced this action to the date it served its discovery requests.” (*Id.* at 3–4). And VCR’s
 2 discovery requests are unnecessary because Enwave’s MPSJ “can be decided without any
 3 discovery as the motion seeks the determination of a purely legal issue and the contracts at
 4 issue are unambiguous.” (*Id.* at 14). Magistrate Judge Albregts granted a stay of discovery:

5 After considering all of the arguments raised by the parties, the Court finds
 6 that Defendant has carried its burden of demonstrating that a stay of discovery
 7 is warranted in this case. Having taken a preliminary peek at the Motion for
 8 Partial Summary Judgment (ECF No. 39), the Court is not convinced that
 9 Plaintiff’s claims will survive dismissal. The issues before the Court in the
 10 pending dispositive motion do not require further discovery as it has been fully
 11 briefed. The Court recognizes that Plaintiff has requested further discovery
 12 pursuant to Fed.R.Civ.P. 56(d), but it is not persuaded that such discovery is
 13 necessary for the District Judge to resolve the motion. Additionally, discovery
 14 is expensive and resolving issues or limiting claims at the earliest possible
 15 stage of litigation is important.

16 (ECF No. 57 at 3). VCR and Interface object to the discovery stay. (ECF No. 62). And in
 17 opposing Enwave’s MPSJ, VCR and Interface ask the court to deny the motion without
 18 prejudice while the parties engage in discovery pursuant to Rule 56(d). (ECF No. 44 at 26).

19 **II. Legal Standard**

20 If the party opposing summary judgment shows by “affidavit or declaration that, for
 21 specified reasons, it cannot present facts essential to justify its opposition, the court may: (1)
 22 defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or
 23 to take discovery; or (3) issue any other appropriate order.” Fed. R. Civ. P. 56(d)(2). “The
 24 requesting party must show: (1) it has set forth in affidavit form the specific facts it hopes to
 25 elicit from further discovery; (2) the facts sought exist; [and] (3) the sought-after facts are
 26 essential to oppose summary judgment.” *Family Home and Fin. Ctr., Inc. v. Fed. Home*
 27 *Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). The party opposing summary
 28 judgment must show that the sought-after facts would preclude summary judgment. *Blough*
v. Holland Realty, Inc., 574 F.3d 1084, 1091 (9th Cir. 2009) (citing *Chance v. Pac-Tel*
Teletrac Inc., 242 F.3d 1151, 1161 n.6 (9th Cir. 2001)); *Tatum v. City & Cnty. of San*
Francisco, 441 F.3d 1090, 1100–01 (9th Cir. 2006).

A Rule 56(d) request should be granted when “a summary judgment motion is filed so
 early in the litigation, before a party has had any realistic opportunity to pursue discovery

relating to its theory of the case,” that a non-moving party cannot oppose summary judgment. *Burlington Northern Santa Fe R.R. Co. v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003). However, mere temporal proximity of a motion for summary judgment and start of discovery is not sufficient to grant a request if additional discovery would be futile or if the parties already know of or agree on the facts. *See generally id.*

“[A]lthough [Rule 56(d)] facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, the Supreme Court has restated the rule as *requiring*, rather than merely permitting, discovery ‘where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.’ ” *Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)) (emphasis added).

III. Discussion

VCR asserts that the following sought-after facts would preclude summary judgment for Enwave:

As such, discovery should proceed to decipher: (i) the conflicting interpretations of the Third Amendment; (ii) the long term relationship and multiple negotiations between VCR, Interface, and GCS and its predecessors; (iii) those parties understanding as to VCR’s right to sole ownership of the Central Plant; (iv) the negotiations and intent of the ESAs and Third Amendment; (v) VCR’s substantial investment into the initial construction, improvements, and maintenance of the Central Plant through the ESA term; (vi) Enwave’s President and COO’s written admission as to VCR’s interpretation of the parties’ agreements and long-term understanding as to VCR’s right to sole ownership, and (vii) the intent and understanding of the REA as applicable to VCR, Interface, GCS, and the Central Plant.

(ECF No. 44 at 941).

In opposing VCR’s Rule 56(d) request, Enwave treats it as a foregone conclusion that the contract at issue is unambiguous and that it offers the only reasonable interpretation of it. (ECF No. 46 at 18). If a contract is unambiguous, “its terms must be given their plain meaning and the contract must be enforced as written; the court may not admit any other evidence of the parties’ intent because the contract expresses their intent.” *Ringle v. Bruton*,

1 86 P.3d 1032, 1039 (Nev. 2004); *see also State ex rel. List v. Courtesy Motors*, 590 P.2d 163,
 2 165 (Nev. 1979). However, summary judgment is not proper when a contract is ambiguous,
 3 because the court must then rely on extrinsic evidence to resolve the ambiguity. *Dickenson*
 4 *v. Satte, Dep't of Wildlife*, 877 P.3d 1059, 1061 (Nev. 1994). A contract is ambiguous if it
 5 may be reasonably interpreted in more than one way. *Galardi v. Naples Polaris, LLC*, 301
 6 P.3d 364, 366 (Nev. 2013).

7 VCR should be able to oppose summary judgment with the extrinsic evidence it seeks
 8 in discovery. Namely, discovery related to the parties' understanding of the contractually
 9 defined term Divided Share, especially in the absence of any clear joint ownership provision
 10 governing this crucial common asset, could preclude summary judgment for Enwave. (ECF
 11 No. 44 at 938). The core of the dispute is whether the Divided Shares are cost allocations as
 12 well as ownership allocations. *Compare* (ECF No. 44 at 10), *with* (ECF No. 46 at 13).

13 Furthermore, discovery related to "the long term relationship and multiple
 14 negotiations between VCR, Interface, and GCS and its predecessors" could also preclude
 15 summary judgment for Enwave. (ECF No. 44 at 941). When the original ESAs were
 16 executed in 1997, all three contractually defined Buyers were affiliates of VCR. (*Id.* at 11).
 17 Today, one of the three Buyers, GCS, is an affiliate of Enwave, the seller of the Central
 18 Plant. (*Id.*). The Third Amendment—especially its contractual definition of only VCR as
 19 Buyer—may be reasonably interpreted to reflect this development.

20 In contrast, any discovery related to the REA will likely be unhelpful in resolving
 21 ambiguities because, although the REA is referenced in the Third Amendment, Enwave is
 22 not a party to it. (ECF No. 39-5). The REA governs VCR, Interface, and GCS's rights and
 23 obligations among each other and not Enwave's obligation to convey the Central Plant.
 24 (ECF No. 37 at 7).

25 In sum, granting VCR's Rule 56(d) request is not authorizing a "futile search." *Allen*
 26 *v. United States*, No. CV 03-01358-DAE-RJJ, 2012 WL 5497887, at *9 (D. Nev. Nov. 13,
 27 2012). It permits VCR to gather essential extrinsic evidence to offer an opposing
 28 interpretation of a potentially ambiguous contract. After all, this court declined to consider

1 summary judgment on VCR's breach of contract claim without any discovery and now does
 2 the same on Enwave's MPSJ on its breach of contract counterclaim. *Cf. Williams v. Yuan*
 3 *Chen*, NO. S-10-1292 CKD P, 2011 WL 4354533, at *3 (E.D. Cal. Sept. 16, 2011) (denying
 4 a motion for summary judgment where the opposing party had not yet filed an answer and
 5 the court had not issued a discovery order).

6 Nevertheless, the court and the parties are obliged to "secure the just, speedy, and
 7 inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. To that end,
 8 the court orders a pre-discovery early settlement conference with the magistrate judge. *See*
 9 LR 1-1(b); LR IB 1-7(b); *James v. Alessi*, No. 218CV01398JADEJY, 2020 WL 5751561, at
 10 *7 (D. Nev. Sept. 24, 2020) (ordering a pretrial settlement conference after ruling on cross-
 11 motions for summary judgment).

12 **IV. Conclusion**

13 Accordingly,

14 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Enwave's motion for
 15 partial summary judgment (ECF No. 39) be, and the same hereby is, DENIED without
 16 prejudice.

17 IT IS FURTHER ORDERED that VCR and Interface's objection to a stay of
 18 discovery (ECF No. 62) be, and the same hereby is, DENIED as moot.

19 IT IS FURTHER ORDERED that this case is REFERRED to Judge Albregts for a
 20 MANDATORY SETTLEMENT CONFERENCE. The parties' obligation to file a stipulated
 21 proposed discovery plan and scheduling order (ECF No. 57) is STAYED until 10 days after
 22 the conclusion of that settlement conference.

23 DATED November 16, 2020.

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 UNITED STATES DISTRICT JUDGE